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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-682

SANTA CLARA PUEBLO, and LUCARIO PADILLA, individually and as Governor of the Santa Clara Pueblo,
Petitioners,

v.

JULIA MARTINEZ, on behalf of herself and all others similarly situated,
and
AUDREY MARTINEZ, on behalf of herself and all other similarly situated,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF AMICUS CURIAE CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION IN SUPPORT OF PETITIONERS

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I.

THE INTEREST OF AMICUS CURIAE

The Confederated Tribes of the Colville Reservation are a recognized Indian tribe, with approximately 5,500 enrolled members, occupying a reservation in central Washington containing 1.3 million acres. It is concerned that the decision in this case be consistent with the sovereignty of Indian tribes. It is therefore, deeply interested in two principles which are involved in this case: First, that the im-

munity of the tribes from suit not be considered waived unless an express waiver is found in an Act of Congress or of the tribe. Second, that if federal courts have the right to judge the propriety of tribal decisions, they do so under a rule which gives due deference to tribal decisions, where the problem facing the tribe calls for the application of Indian values and beliefs to modern problems.

The Confederated Tribes of the Colville Reservation have a deep regard for the rights of all persons coming under its jurisdiction. However, the Colville Confederated Tribes feel it important for the Court to understand the principle of tribal integrity which is at stake.

II.

SUMMARY OF ARGUMENT

A. The Indian Civil Rights Act Does Not Authorize Federal Courts to Invalidate the Substantive Laws of an Indian Tribe.

1. Governmental immunity from suit is fundamental to our law. Selective waiver of immunity by the legislature is the best public policy and the only proper way to permit suits against governments. Indian tribes are no exception to this rule. The 1975 Indian Self-Determination Act reaffirms that, as does this Court's recent decision in *Puyallup Tribe, Inc. v. Department of Game of Washington*. The Indian Civil Rights Act does not expressly waive immunity of tribes. The substantive provisions of the Act are declaratory, not remedial. The only remedy provided in the Act is habeas corpus, which is consistent with tribal immunity. Congress intended that the Act be self-executing within the framework of tribal government. It further intended that implementation would occur through a model code to be prepared by the Interior Department.

2. Federal courts have no jurisdiction over Indian tribes

under the Indian Civil Rights Act. The Act does not confer jurisdiction to hear cases brought under the Act and 28 U.S.C. §1343(4) is only a jurisdictional statute. It may be used to sustain jurisdiction only where a substantive right and cause of action are created by an act of Congress. It does not confer jurisdiction to hear cases brought under the Indian Civil Rights Act, nor does it waive immunity from suit.

B. The Equal Protection Clause of the Indian Civil Rights Act mandates deference to tribal classifications. The clause was intended by Congress only to require even-handed application of tribal laws. It was not conceived as a vehicle for imposing upon Indian tribes, changing or expanding egalitarian views drawn from Anglo-American society.

C. Indian tribes are *sui generis* and this mandates great deference to tribal as well as Congressional decision making in this area.

D. The tribal interest in governing its membership is at least as fundamental as the plaintiff's interest in claiming membership. Contemporary analytical approaches to equal protection under the United States Constitution are inappropriate to Indian tribes. Any rule should give great weight to tribal decision making. Gender distinctions are as valid as blood quantum distinctions so long as they are supported by some reason relevant to tribal values.

III.

ARGUMENT

A. The Indian Civil Rights Act Does Not Authorize Federal Courts to Invalidate the Substantive Laws of an Indian Tribe

1. *Tribal Immunity From Suit*

a. General rule

The principle that a sovereign government cannot be sued in any court without its consent or permission has

come to our jurisprudence through the common law. The immunity of the United States from suit in the federal courts was recognized from our earliest beginnings as a government. *See Chisholm v. Georgia*, 2 Dall. 419, 430, 469 (U.S. 1773); *United States v. Clarke*, 8 Pet. 436, 444 (U.S. 1834). The Eleventh Amendment, adopted in 1798, enforced comparable immunity for the states.

The doctrine permits suit only where the government grants permission, and by doing so, waives its immunity. However, because of the importance of the public interests at stake, such a waiver has been uniformly required to be clearly and expressly asserted.

While sovereign immunity has its critics, the selective waiver of immunity by governments remains the best means of insuring that the judicial branch will not be employed as a means of disrupting governmental processes, nor of tapping governmental treasuries.

Where express consent to suit has not been given, determined litigants have commonly relied on statutes dealing with the general subject matter, or general jurisdictional statutes, to support their claim of waiver, either express or implied. This Court has repeatedly struck down such efforts. *See United States v. Testan*, 424 U.S. 392 (1976) (rejecting the argument that the Tucker Act waived sovereign immunity and conferred jurisdiction on the Court of Claims to redress violation of a substantive right. *See also United States v. Sherwood*, 312 U.S. 584 (1941); *United States v. King*, 395 U.S. 1 (1969); *Soriano v. United States*, 352 U.S. 270 (1957); *Ford Motor Company v. Department of Treasury of Indiana*, 323 U.S. 459 (1945).

b. Tribes immune from suit

The immunity of Indian tribes from suit was affirmed in 1895. The Eighth Circuit was presented with a suit brought against the Choctaw Tribe by an attorney seeking to recover his fees. The action was dismissed. *Thebo v. Choctaw Tribe*, 66 F. 372 (8th Cir. 1895). The court rejected the plaintiff's claim that a statute conferring jurisdiction in the territorial courts over suits on contracts between citizens of the United States and Indian tribes, constituted a waiver of immunity, absent an express grant of authority to bring suits against a tribe.[1] The court there found that Indian tribes occupied a position equivalent to that of the states under the Eleventh Amendment, but because of the tribes' status as domestic dependent nations, the United States could authorize suits to be brought against it. Subsequent decisions have reaffirmed the rule, in each case rejecting contentions that waiver was to be found in general jurisdictional statutes. *Turner v. United States*, 248 U.S. 354 (1919); *Adams v. Murphy*, 165 F. 304 (8th Cir. 1908); *United States v. United States Fidelity and Guaranty Co.*, 309 U.S. 506 (1940).

Congress specifically recognized and reaffirmed the doctrine of sovereign immunity in the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C.A. §450, *et seq*. That Act authorized Indian tribes to contract for the performance of functions performed by the Interior Department and the Department of Health, Education and Welfare. It authorized those Departments to require tribes

1. This case and similar cases dealing with the doctrine of sovereign immunity as applied to Indian tribes are discussed in more detail in the writer's article, *In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act*, 20 S.D.L. Rev. 1. (1975)

to obtain liability insurance which "shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense a tribe's sovereign immunity from suit, but that such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage and limits of the policy of insurance." 25 U.S.C.A. §450f(c) and §450g(c). See also §450(n) which provides:

> Nothing in this Act shall be construed as —
>
> (1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe;
>
> • • •

This Court has within the past few weeks reaffirmed the vitality of tribal sovereign immunity in *Puyallup Tribe, Inc. v. Department of Game of Washington*, 45 L.W. 4837, (June 23, 1977), relief being denied to the State of Washington against the Puyallup Tribe upon the ground of the sovereign immunity of the Tribe from suit.

c. The Indian Civil Rights Act and sovereign immunity

The Indian Civil Rights Act of 1968 contains no express waiver of sovereign immunity of Indian tribes. Its only remedial provision is 25 U.S.C.A. §1303, conferring jurisdiction upon federal courts to grant writs of habeas corpus where there is detention by order of an Indian tribe. A writ of habeas corpus is directed to an individual responsible for the detention, and this section cannot, therefore, be read as a waiver of tribal immunity.

Yet, since the first case construing the Act, *Dodge v. Nakai*, 298 F. Supp. 17 (D. Ariz. 1968) every federal court

which has considered claims against tribes brought under the Act has ruled that the Act constitutes a waiver of tribal immunity from suit. The rationale found in all the cases is the same: unless waiver is implied, the Act would be unenforceable and thus meaningless.

But a reading of the legislative history makes it clear that Congress had in mind very limited remedies and considered the Act to be self-executing. Furthermore, it conceived that the principle means by which the Act would be implemented was a model code which would be promulgated by the Interior Department within one year from the passage of the Act. This would give those tribes not having civil rights guarantees in their tribal constitutions or tribal law and order codes, time to develop their own codes containing such guarantees or adopt the procedures necessary to conform to a Secretarial model code. Finally, where a tribe acted to the extent of detaining an individual, habeas corpus would be available in the federal courts.

The intent of the Act was succinctly stated by Senator Ervin, its principle architect:

> We have no desire to interfere with or to cut into tribal authority. We seek only to strengthen that and at the same time strengthen the rights of the American Indian, both under tribal authority and under the Constitution.[2]

The Senate Subcommittee on Constitutional Rights initially considered S. 961, a bill which would have imposed all of the restraints contained in the United States Constitution. However, when Mr. Frank J. Barry, Acting Secretary of

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2. Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 87th Cong. 1st Sess., Port 2 (1961), p. 287.

the Interior, pointed out the unworkability of this as applied to Indian tribes, the Committee was receptive.

In June, 1965, the Interior Department submitted to the Committee a substitute bill. This substitute bill specifically enumerated those provisions of the Bill of Rights which were deemed by the Interior Department to be workable in the context of Indian political life.[3]

The bill proposed by the Department contained the habeas corpus provision subsequently enacted into law. In addition, all of the substantive provisions of the Department's bill were ultimately enacted by the Congress and are now the substantive provisions of 25 U.S.C. §1302. The Committee's view was that the substantive provisions of S. 961 would be implemented in two ways: federal court intervention would be available in cases of detention under the habeas corpus clause remedy provided for. S. 964 would require the Interior Department to promulgate a model code which would incorporate substantive provisions of the Act in the criminal context only.[4] Indeed, this measure was deemed so important that it was initially proposed that a one-year moratorium be established in order to allow tribes time to adopt their own written codes, or in the alternative to accept the Department's code.[5] The one-year moratorium was, however, dropped at some point in the legislative procedure.[6]

3. Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 89th Cong. 1st Sess. (1965) (Hereinafter cited as 1965 Hearings) p. 317-318.

4. Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, *Summary Report of Hearings and Investigations: Constitutional Rights of the American Indian*, 89th Cong., 2d Sess. P. 26 (1966) (hereinafter cited as 1966 Summary Report).

5. *Id.*

6. *See* Staff of Senate Committee on the Judiciary, Subcommittee on Constitutional Rights, 89th Cong., 2d Sess., Monthly Report, (November 1966).

But it is clear that the Committee considered the provisions of Title I to be primarily self-executing. It appears from the legislative history that the Committee assumed that by the enactment of a statement of rights, now contained in §1302, Congress would establish the Bill of Rights as a part of the organic law of all of the tribes in the United States. This would remedy what the Committee considered to be one of the basic problems: the absence of civil rights provisions from many tribal constitutions. *See Burnett, An Historical Analysis of the 1968 "Indian Civil Rights" Act*, 9 Harv. J. Legis. 557, 579 (1972). In its own reports the Committee frequently referred to Title I containing the enumeration of rights as in itself assuring adequate protection.[7] See *Protecting the Rights of the American Indian*, 90th Cong., 1st Sess., Report No. 841, December 6, 1967 at 6 where, in describing the purpose of Title I the report states:

> The purpose of Title I is to protect the individual Indians from arbitrary and unjust actions of tribal governments. This is accomplished by placing certain limitations on an Indian tribe in the exercise of its powers of self-government. . . .
>
> . . .
>
> It is hoped that Title II, requiring the Secretary of the Interior to recommend a model code for all Indian tribes, will implement the effect of Title I.
>
> Accordingly, the provisions of Title I are scheduled to take effect upon the expiration of one year from the date of enactment, thus affording Indian tribes a period in which to prepare themselves for a new concept of law and order.
>
> TITLE II
>
> The purpose of Title II is to provide for a model code which will safeguard the constitutional rights of the

7. *See Senate Committee on the Judiciary, Protecting the Rights of the American Indian, S. Report No. 91-294*, 91st Cong., 1st Sess. 2 (1969).

> American Indian. The Secretary of the Interior would be directed to draft a model code of Indian offenses which would apply uniformly to all Indian courts in Indian country, thus assuring that all Indians receive equal justice under the law. It is also envisioned that the model code would incorporate those rights enumerated in TITLE I, which places certain limitations on Indian tribal governments in the exercise of self-government, particularly in the administration of justice.

Despite the awareness of the Senate Judiciary Committee of the deprivation of rights in non-criminal contexts, there is simply no suggestion in the legislative history that the Senate Subcommittee of the Congress gave any consideration to empowering federal courts to intervene in these matters. The habeas corpus provision stands in glaring isolation as the only substantive and remedial provision contained in the Act.

The legislative history indicates that Congress deliberately intended to take a first and limited step in this new and delicate area. Senator Ervin himself said to the Senate when he introduced his bill:

> . . . I wish to emphasize that these bills should not be considered as the final solution to the many serious Constitutional problems confronting the American Indian. A system of law and order for the Indian tribes of America which is in keeping with the rights and privileges other Americans enjoy will take years to develop.[8]

As the Subcommittee itself stated in reporting on the bills:

> What is now proposed is only an approximation to a perfect system. Much is necessarily left out for the present to Executive discretion, and still more to future legislation.[9]

8. 113 Cong.Rec. 13473 (1967).
9. *1966 Summary Report* at 25.

Thus, it appears that Congress intended to take a first and limited step in proposing constitutional standards on Indian tribes. By providing court review where there was detention of the person, and establishing uniform principles of individual rights which would be applicable to all the tribes, Congress made a first and unusual incursion into the internal affairs of Indian tribes. Congress was well aware that should it appear the tribal governments ignored the commandments of the Act so that additional remedies were needed, they could take such steps as were necessary to vest the federal courts with additional jurisdiction.

2. *Federal Courts Have No Jurisdiction Over Indian Tribes Under the Indian Civil Rights Act*

In this case, the court below found that the District Court had jurisdiction under 28 U.S.C. §1343(4) which provides:

> The District Courts shall have original jurisdiction of *any civil action authorized by law* to be commenced by any person: . . .
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of Civil Rights, including the right to vote.
>
> [Emphasis supplied]

This is clearly a jurisdictional statute only, which confers jurisdiction on the federal district court where an act of Congress establishes a cause of action for deprivation of civil rights and authorizes suits. It has been repeatedly held that this section is not a waiver of sovereign immunity. *Service Arms Co. v. United States Treasury Department, Alcohol, Tobacco and Firearms,* 416 F. Supp. 2 (D.C. Okla. 1975); *Henry v. Schlesinger,* 407 F. Supp. 1179 (D.C. Pa. 1976); *Peterway v. Veteran's Administration Hospital,*

495 F.2d 1223 (5th Cir. 1974); *Beale v. Blount*, 461 F.2d 1133 (5th Cir. 1972); *Corbean v. Xenia City Board of Education*, 366 F.2d 480 (6th Cir. 1966) *cert. den.*, 385 U.S. 1041; *De Kosenko v. New York*, 311 F. Supp. 126 (D.C. N.Y. 1969), *aff'd*, 427 F.2d 351 (5th Cir. 1970).

25 U.S.C.A. §1302 is not an act providing for the "*protection* of civil rights". It is declaratory of rights, not remedial. This Court recently held in *United States v. Testan, supra*, that the Tucker Act, 28 U.S.C. §1491, merely gave jurisdiction to the Court of Claims to render judgment against the United States in appropriate cases. The Tucker Act is analogous to 28 U.S.C. §1343(4). The Court found the Tucker Act did not create any substantive rights enforceable against the United States. Nor, said the Court, did it waive sovereign immunity as to measures necessary to redress violation where a substantive right was created. This Court held that where the United States is defendant, a grant of a right of action must be made with specificity.

For a fuller discussion of the improper application of jurisdictional statutes to Indian Civil Rights Act complaints, see *Ziontz, supra*, note 1, at 20-38; *see also Note, Implication of Civil Remedies Under the Indian Civil Rights Act*, 75 Mich. L. Rev. 210 (1976).

3. *Consequences of Finding Implied Waiver of Immunity*

While only one court has thus far upheld a claim for money damages against an Indian tribe under the Act, (*Loncassion v. Leekity*, 334 F. Supp. 370 (D. N.M. 1971)), given the apparently unlimited remedies deemed available under the Act by the decisions in the 8th, 9th and 10th Circuits, it is only a question of time before other courts

follow suit. It is difficult to see how any line can be drawn once courts have accepted the view that tribes have no immunity from suit under the Act. Compare the position of tribes in this respect with public officials. In *Imbler v. Pachtman*, 424 U.S. 409 (1976) the common law rule of absolute immunity of prosecutors from civil liability was held to supercede 42 U.S.C. §1983, specifically granting a cause of action for damages against public officials who conspire to deprive a citizen of civil rights.

This Court should adhere to the principles it has steadily espoused that where any sovereign immunity is to be waived, it must be done by the legislative body charged with such responsibility in a knowing and direct manner. Since Congress has previously dealt with this problem in the Indian Self-Determination and Educational Assistance Act, it can surely deal with the problem in this context.

B. The Equal Protection Clause of the Indian Civil Rights Act Mandates Deference to Tribal Classifications

1. *The Legislative History of the Clause and Congressional Intent*

The equal protection language of the Act must be read in a manner consistent with the Congressional intent. That intent was clearly to protect individual members of tribes from the tyranical or abusive conduct of tribal governments. The Congress had no assimilationist purpose in mind in this legislation, as it did in the case of earlier legislation such as Public Law 83-280. (Authorizing certain states to assume jurisdiction over Indians.)

While 25 U.S.C. §1302(8) employs the familiar phrases of the Fourteenth Amendment ("equal protection" and "due process"), its language is not, in fact, identical to the

Fourteenth Amendment, nor was its effect intended by Congress to be identical. Only a portion of §1 of the Fourteenth Amendment is included and that portion differs significantly from the language of the Fourteenth Amendment.[10]

The Fourteenth Amendment mandates that a state may not "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Subsection 8, §1302 provides that no Indian tribe shall:

> . . . deny to any person with its jurisdiction the equal protection of *its* laws or deprive any person of liberty or property without due process of law.
> (Emphasis supplied)

A review of the legislative history suggests that the Subcommittee on Constitutional Rights understood that this language was tailored to fit Indian tribes and imposed only a duty of equality of treatment within classifications made by the tribe.

For instance, in explaining the Interior Department bill, which would be a substitute for S. 961, Assistant Secretary of Interior Frank Barry told the Senate Subcommittee:

> Admittedly, S. 961 would extend to Indians the rights enumerated in the First Amendment, the Fourth Amendment, the Fifth Amendment, the Sixth Amendment, the Eighth Amendment. However, it would not include rights guaranteed in the Fourteenth Amendment which applies only to states. Nowhere else in the Constitution is it required that the government give the persons within its jurisdiction equal protection of

10. The language of subsection 8 of §1302 omits two entire clauses of §1 of the Fourteenth Amendment; the citizenship clause, and the privileges and immunities clause. Sections 2, 3, 4 and 5 of the Amendment are also not included in the Act.

> its laws. I would assume that the sponsors of this legislation and the Congress, in extending civil rights to the Indians, would want to assure to individual Indians equal protection *of the laws of a tribe*.[11]
> (Emphasis supplied)

And again in the same testimony,

> Finally, we believe that the tribes should be prohibited from denying to any persons within their jurisdiction equal protection of *their laws*.[12]
> (Emphasis supplied)

As the Subcommittee stated in its Summary Report,

> The Department of Interior's bill would, in effect, impose upon the Indian governments the same restrictions applicable presently to the federal and state governments with several notable exceptions, viz, the Fifteenth Amendment, certain other procedural requirements of the Fifth, Sixth and Seventh Amendments, *and in some respects, the equal protection requirement of the Fourteenth Amendment*.[13]
> (Emphasis supplied)

2. *The Equal Protection Clause and the* Sui Generis *Status of Indian Tribes*

The Indian Civil Rights Act must be read together with the entire body of law, both statutory and case law, which recognizes Indian tribes as unique entities entitled to distinctions not permitted to any other group in the American legal system.

In *Morton v. Mancari*, 417 U.S. 535 (1974), this Court upheld the Indian Preference Act in the face of an equal protection challenge on the ground that Indians are *sui*

11. 1965 Hearings, *supra*, at 18.

12. *Id.*

13. Summary Report of Hearings and Investigations by the Subcommittee and Constitutional Rights of the Committee of the Judiciary, United States Senate, 89th Cong., 2d Sess. (1966), p. 25.

generis in the American legal system. The action of Congress in extending preferences to members of this group was found to be reasonably related to its purpose in furthering Indian self-government. The court rejected the argument that such discrimination was 'invidious racial discrimination" because of the unique political and legal status of Indian tribes.

In *Delaware Tribal Business Committee v. Weeks,* ..... U.S. ....., 97 S. Ct. 911 (1977) this Court rejected an equal protection challenge brought by an Indian group which had been excluded from participating in the distribution of a judgment fund awarded to the Delaware Tribe. In examining the basis for the Congressional decision it appeared that although there were facts supporting the Congressional decision, there were also facts which would support the plaintiff's claim for inclusion in the distribution. In making the determination in favor of the validity of the Congressional judgment, the Court gave great consideration to the fact that the authority of Congress to control tribal assets was "one of the most fundamental expressions, if not the major expression, of the constitutional power of Congress over Indian affairs . . ." *Id.* at 919.

The decision then concluded that the legislative judgment should, therefore, not be disturbed, ". . . as long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Id.*

In *United States v. Antelope,* ..... U.S. ..... (45 U.S.L.W. 4361, April 19, 1977) the Court upheld the Major Crimes Act against an equal protection challenge by an Indian who had been convicted in federal court of felony murder, an offense which required a lower standard of proof than the

Idaho murder statute which would apply to a non-Indian who killed a non-Indian on the Indian reservation. The Court ruled that the Act did not violate the equal protection clause (as incorporated by the Due Process Clause of the Fifth Amendment) since the fact that state law differed was not constitutionally significant. The Court stated it would look only at whether the federal law, applicable to federal enclaves, was evenhanded in its treatment of all persons within its jurisdiction. The fact that the complainant would have received different or more advantageous treatment under a different jurisdiction was irrelevant to the analysis.

Similarly, in *Fisher v. District Court,* 424 U.S. 382 (1976), it was held that denial of access to state courts in connection with an adoption proceeding arising on a reservation was constitutionally justifiable, even though it resulted in an Indian being denied a benefit or privilege available to non-Indians, in light of the quasi-sovereign status of the Northern Cheyenne Tribe under federal law.

Mancari, Fisher and *Antelope* all upheld classifications which imposed disabilities or extended benefits on a basis which might otherwise violate the equal protection guarantee had the cases not arisen in the context of Indian tribal affairs, a context which is *sui generis* in American law.

The *sui generis* nature of Indian tribes, when taken with the legislative history of the Indian Civil Rights Act, mandates great caution in aplying analytical techniques of the Equal Protection Clause derived from the Anglo-American context to the Indian tribal context. Any means-ends analysis here is fraught with the danger of ethnocentric value judgments. As Professor Gunther points out in his article

in the Harvard Law Review,[14] the traditional two-tier analysis involves the Court in an examination of legislative ends in terms of the "compelling interest" of the state. This unavoidably weights the "ends" with the Court's own value perceptions. Furthermore, it is inherently impossible to analyze the "suitability" or "rational" connection between the means chosen by a legislative body and its objective without employing relative values. For example, as Gunther points out, the emergence of the new equal protection analysis during the late 1960's gave rise to expectations that the clause would lead to ever-expanding judicial intervention in the interests of egalitarianism.

Recent decisions of the Court indicate increasing concern with the kinds of presumptions which follow from the applicability of the two-tier test. *Craig v. Boren*, ... U.S. ....., 45 L.W. 4057 (December 20, 1976); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976).

The two-tiered approach is peculiarly inappropriate to the analysis of tribal laws where the preservation of tribal values are essential. Not only does the identification of "fundamental rights" involve the imposition of the Court's values, but the applicability of the idea of "suspect" classes loses its force. The idea of "suspect" classes incorporates a value judgment. It derives from observation of the practices of the society which are in conflict with its professed ideals and principles. It may seem obvious that gender-based discrimination is "suspect" when viewing the practice in a society which is moving towards the near-total elimination of sexual distinctions, but is not nearly so obvious when viewing a traditional society such as the

14. *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972).

Amish, or certain Indian tribes. Their world-view may be wholly different than our own, and such discrimination may in fact be in harmony with the ideals of that society.

The great triumph of Western democracy is the establishment of the primacy of individual liberty against the power of the state. However, Indian tribes have traditionally stood in an entirely different relationship to their members than the state has to its citizens. Modern states in mass societies are faceless, impersonal and remote. Their actions present constant threats to individual freedom. Indian tribes are not comparable to mass societies. Typically, Indian communities are based on extended family principles and tribal government is a part of that system.

Under these circumstances, the Court has a duty to formulate a rule which carries out the Congressional intent underlying the Indian Civil Rights Act, bearing in mind, as Congress did, the unique social context to which it applies. If the federal government is given broad latitude in its decision making with respect to dealing with Indian tribes, should not the same latitude be given to the tribes in dealing with their members? *Morton v. Mancari*, *Delaware Tribal Business Commission v. Weeks*, *United States v. Antelope*, and *Fisher v. District Court*, all strongly suggest that the equal protection clause of the Indian Civil Rights Act should be applied to tribes in a much more deferential manner than they are applied to other branches of government. *See Note: Equal Protection Under the Indian Civil Rights Act: Martinez v. Santa Clara Pueblo*, 90 Harv. L. Rev. 627.

The rule of *Morton* and *Delaware Tribal Business Commission* could well be applicable:

> "... the legislative judgment should not be disturbed as long as the special treatment can be tied rationally to the fulfillment of (Congress's) unique obligation toward the (Indians)"

Morton v. Mancari, 417 U.S. 535, 555 (1974).

Perhaps an even better principle of adjudication of such claims might well be phrased as follows:

> A classification made by an Indian tribe will be overturned only when it clearly appears that it results in a deprivation of individual liberty guaranteed by the Indian Civil Rights Act.

This formulation would avoid most, if not all, of the difficulties arising from expanding notions of individual liberty, not grounded in any express constitutional provisions, which are developed by the Anglo-American society and its courts. It would minimize the imposition of conscious or unconscious ethnocentrism yet preserve the fundamental guarantees of liberty made by the Act. It would prohibit tribal classifications which impaired any type of activity protected by §1302(1), that is, First Amendment rights; or §1302(8), due process rights, together with all of the other rights set forth in the Act. It would carry into effect the Congressional purpose that tribal laws be applied in an even-handed manner.

It would, for example, have resulted in striking down the Navajo ordinance which discriminated against the Native American Church which was at issue in the case of *Native American Church v. Navajo Tribal Council*, 272 F.2d 113 (10th Cir. 1951), because that ordinance would have directly conflicted with the provisions of the Act which denies to an Indian tribe the power to make or enforce any law prohibiting the free exercise of religion.

It would relieve the Court of the burden of determining

over-inclusive or under-inclusive classifications in the context of Indian tribal life. That there may be other solutions to a problem which might eliminate the disability complained of is not of itself a sound basis for judicial intervention in Indian tribal government. It would also relieve the Court of the duty to inquire into the legislative history of a tribal law. This history may involve Indian values and judgments not properly understood or appreciated by Anglo-American judges. It would extend to the actions of Indian tribes appropriate deference. That deference is mandated if the Indian Civil Rights Act is not to become an engine of destruction of Indian uniqueness. No matter how the Court may view the desirability or undesirability of that uniqueness, the Act was not designed to further Indian assimilation.

C. The Tribal Interest Here Manifestly Justifies Its Classification

Intermarriage creates problems for all homogeneous cultural or ethnic groups. Acute strains are created when membership means entitlement to a share in a limited resource, such as land. How the group resolves this problem will necessarily reflect its basic values. Any solution which excludes the children of some members will be harsh—imposing penalties on sons or daughters who choose to intermarry, as well as their children.

While a group may choose to exclude all of the offspring of marriages with outsiders, it is not uncommon for the choice to be based on patrilineal or matrilineal lines. For example, under Orthodox Jewish law, the status of a child born of intermarriage is designated as following that of the

mother.[15] Such choices may be based on what the group feels to be important pragmatic or religious considerations.

Where a group is patrilineal or patrilocal, such as the Santa Clarans, the choice may well reflect the view that a woman member of the Pueblo who marries outside of the Pueblo is more likely to leave it than a male member. This would merely be reflective of the contemporary fact that women do generally take up residence in the community of their husbands. This would appear to be borne out by the facts found by the trial court that sixty percent of the non-residents of the Pueblo were women. While it may also reflect the fact that to some extent perhaps, these women left the Pueblo because of the disabilities which their children would sustain by not being members, the record does not clearly demonstrate this. It is equally possible to hypothesize that they left because they married into cultures with a patrilocal tradition, or that they have followed their husbands to places of employment outside the Pueblo. In any case, it cannot be said that the patrilocal tradition of the Santa Clara Pueblo was irrelevant to their decision to exclude the offspring of females who marry outside of Pueblo.

Is an Indian tribe which excludes the offspring of one sex which marries outside the tribe to be precluded from making such a decision by the equal protection language of the Indian Civil Rights Act?

It is submitted that no such prohibition should be arbitrarily imposed against any tribe. Employing the test proposed here would not mandate such a result. In other words, where the classification does not interfere with the

15. Encyclopaedia Judaica (1971 Ed.) Vol. 10 at 23.

specific guarantees of §1302(1) or any of the other subsections, the tribal classification must stand. If the Court were to employ the rational basis test, the Pueblos ordinance would clearly stand. The two-tiered test is peculiarly inappropriate here since the Pueblos' interest in its membership is at least as fundamental as the plaintiff's interest. There is simply no escaping the problem of balancing these respective interests.

To denigrate the Tribe's decision on the grounds that it is of recent vintage, or that it is based on economic or pragmatic considerations is to ignore the significance of the Tribe's decision in light of its culture.

The record here indicates that the Pueblos' decision to limit membership came as a product of a crisis in its history. The Pueblo underwent severe internal strife resulting from the contact with Anglo-American society over a period of many years, which was apparently resolved by the adoption of its present Constitution and By-Laws in 1935. *See Martinez*, 402 F.Supp. 5, at 13. The Council exercised its constitutional authority to determine which children of mixed marriages shall be recognized as members by enacting the present ordinance in 1939. That ordinance has been in effect for over 35 years. The record also shows that since 1963 plaintiff Julia Martinez has attempted to persuade the Pueblo and its government to change this ordinance. She and other women similarly situated formed a committee which petitioned the Council and which succeeded in having a special meeting of the entire Pueblo convened to discuss the situation. 402 F. Supp. 11. She was apparently unsuccessful.

The ordinance stands, therefore, as the collective judgment of the members of the Pueblo that the ordinance em-

bodies the appropriate principle of classification.

That the decision relates to economic interests does not detract from its interrelation with the life of the Pueblo. Indeed, it only serves to emphasize the issue as one which goes to the very survival of this Community.

The interrelationship of land and economy to the culture of the Pueblo Indians is authoritatively discussed in *The Pueblo Indians of New Mexico, Their Land, Economy and Civil Organization*, by S. D. Aberle.[16] Mrs. Aberle was General Superintendent, United Pueblos Agency, United States Department of Interior from 1934 to 1943. She also was a Ph.D and M.D. As Aberle says:

> A culture is composed of innumerable interlacing parts which depend for their cohesion upon forces both within and without the group.
>
> • • •
>
> Land in the eyes of the Indian is his most precious possession.

Aberle concludes as follows:

> However, the manner in which the more modern Pueblos have adapted their civil forms to changing conditions, the ability of all of the Pueblos to adopt laws which they consider important, their ability to resist changes which they do not believe to be for the good of the Tribe, their ability to handle judicial, legislative and executive functions—all these lead to the conclusion that the civil organizations are not only units adapted to their own life and culture, but that throughout they have maintained their vitality. . . . Insofar as the federal government limits its authority to handling Indian problems which lie outside of the local tribal authority, and refrains itself from entering into decisions which should be under the jurisdiction of Pueblo officials, just so long will the Pueblo organizations continue to function effectively.

16. 50 American Anthropologist No. 4, Part 2, Memoir No. 70.

IV

CONCLUSION

Where devolution of land follows membership, it is crucial for the Pueblo to be able to control membership by principles integral to the values of the Community. Any classification system may well produce anomalous results. Even blood quantum requirements may result in gross disparities in otherwise equal circumstances. It should be remembered that there is nothing culturally sacred about blood quantum. This indeed appears to be a criteria imposed by the Anglo-American society, one which it finds convenient because of its relative mathematical certainty. Nevertheless, blood quantum requirements also reflect a cultural bias by our society. While the Martinez children present the Court with a "hard case", the Court should reject the invitation to substitute its wisdom for the wisdom of the Santa Clara Pueblo.

Respectfully submitted,

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